30-32

# TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 30.

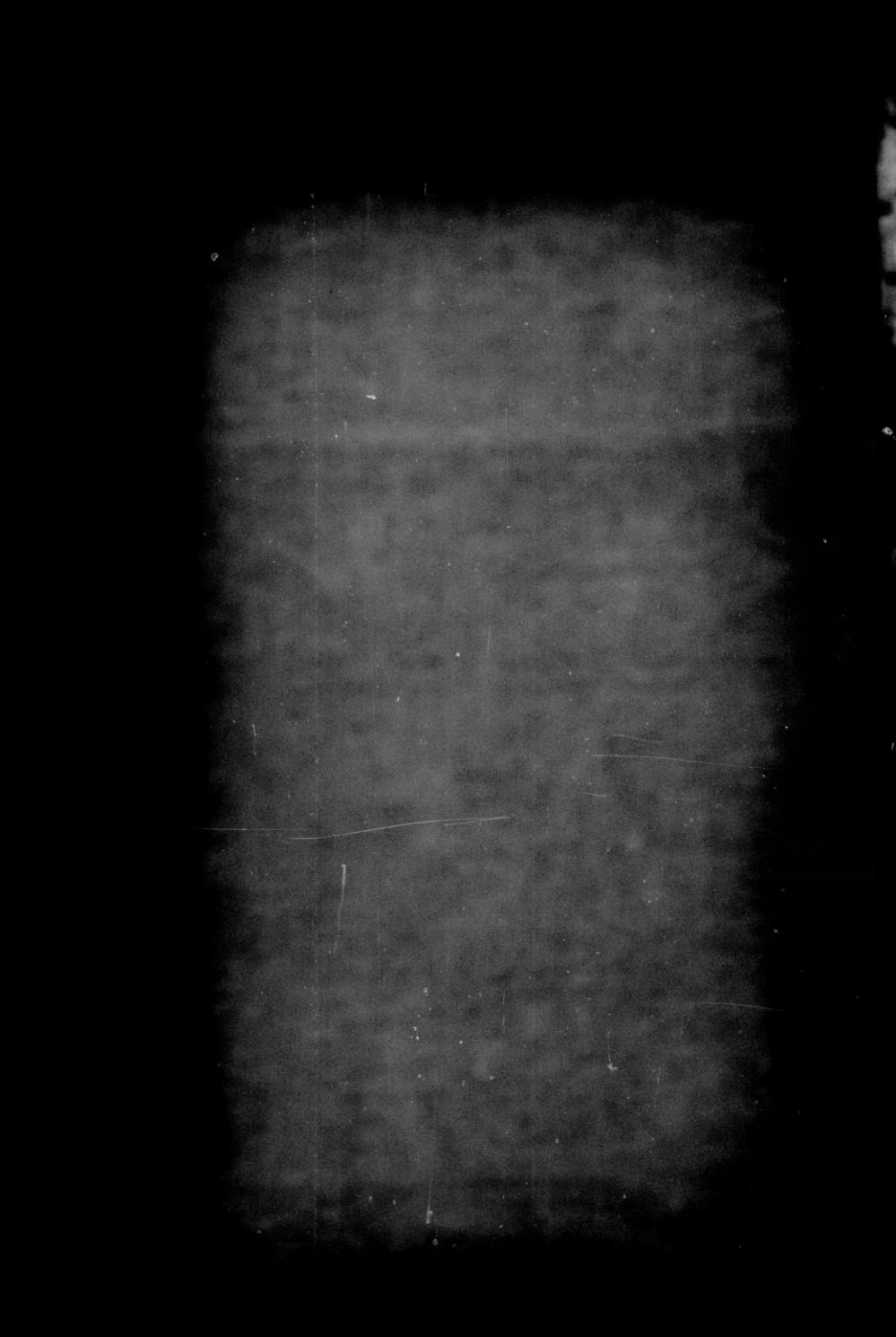
THE STILWELL AND BIERCE MANUFACTURING COMPANY, PLAINTIFF IN ERROR,

vs.

[illegible] PHELPS.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WISCONSIN.

FILED [illegible]



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| Testimony of G. B. Glenn | [illegible] | [illegible] |
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| G. B. Glenn (recalled) | [illegible] | [illegible] |
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1 UNITED STATES OF AMERICA, } ss:
*Eastern District of Wisconsin,* }

Circuit Court of the United States for the Eastern District of Wisconsin.

At a stated term of the circuit court of the United States for the eastern district of Wisconsin, begun and held, according to law, at the city of Milwaukee, in said district, on the first Monday (being the fifth day) of January, A. D. 1885—present, the Honorable Charles E. Dyer, district judge, presiding; Henry Fink, marshal; Edward Kurtz, clerk—among other the following proceedings were had, to wit:

THE STILWELL & BIERCE MANUFACTURING CO., Plaintiff, } At Law.
vs.
AMOS PHELPS, Defendant. }

Be it remembered that heretofore, to wit, on the 21st day of April, A. D. 1884, came the above-named plaintiff, by its attorney, Mr. G. W. Hazelton, and filed its precipe for a summons against the above-named defendant, as follows, to wit:

*Precipe for Summons.*

In the U. S. Circuit Court, E. District of Wisconsin.

STILWELL & BIERCE MANUFACTURING COMPANY
vs.
AMOS PHELPS.

2 Please issue summons in above-entitled action, in accordance with the statute in such case provided.
Yours, &c., G. W. HAZELTON,
*Pl'ff's Att'y.*

Dated April 16, 1884.
To E. Kurtz, Esq., clerk.

And same day (April 21, 1884) filed its complaint to be served, and bond for costs, approved by the clerk.

Whereupon a summons issued, returnable according to law, with said complaint annexed, as follows:

3 Circuit Court of the United States for the Eastern District of Wisconsin.

THE STILWELL & BIERCE MANUFACTURING COMPANY, Plaintiff,
vs.
AMOS PHELPS, Defendant.

[SEAL.] The President of the United States of America to the said defendant:

You are hereby summoned to appear within twenty days after

service of this summons, exclusive of the day of service, and defend the above-entitled action in the court aforesaid, and in case of your failure so to do judgment will be rendered against you according to the demand of the complaint, of which a copy is herewith served upon you.

The marshal of said district is hereby commanded to serve this summons and make due return thereto.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, at the city of Milwaukee, in the said eastern district of Wisconsin, this 21st day of April, in the year of our Lord one thousand eight hundred and eighty-four, and of the Independence of the United States the 108th.

EDWARD KURTZ, *Clerk.*

G. W. HAZELTON,
*Plaintiff's Attorney.*

P. O. address, Milwaukee, Wis.

4 [Endorsed:] 234, Law docket E. The Stilwell & Bierce Manufacturing Company vs. Amos Phelps. Summons and complaint. Filed April 23, 1884. Edw. Kurtz, clerk.

5 *Complaint.*

In the Circuit Court of the United States for the Eastern District of Wisconsin.

STILWELL AND BIERCE MANUFACTURING COMPANY
vs.
AMOS PHELPS.

The complaint of the plaintiff respectfully shows that the said plaintiff is a manufacturing company duly organized and incorporated under the laws of the State of Ohio, and was such on and prior to the 30th day of May, A. D. 1883, and that its headquarters and place of business is at the city of Dayton, in the State of Ohio, and not within the eastern district of Wisconsin or the State of Wisconsin.

That the defendant is a resident and citizen of the county of Walworth, in said district.

That on the said 30th day of May, A. D., 1883, the plaintiff entered into an agreement with the defendant, in writing, wherein and whereby the plaintiff agreed, in consideration of nine thousand dollars, to be paid by the defendant as hereinafter stated, to furnish and put in complete operation for the defendant in his flouring mill at Delavan, in the county of Walworth, in said district, one first-class seventy-five-barrel capacity roller mill complete, including

6 one six-break concentrated mill, 9 x 18; one double 9 x 18 scratch rolls, three No. 3 Excelsior purifiers (if they are now made, otherwise three No. 0, G. F. Smith purifiers), one No. 2 centrifugal reel, one bran-duster, two No. 3 dust-collectors, with fans; one Barnard & Lea's mill separator, 30 to 40 bushels capacity; one 4-reel bolting chest 32 x 16 (or all necessary bolting chests that may

be necessary for a complete job), with one extra smutting garner and one garner over first break (holding about 75 bushels, and necessary bolting cloth, all to be new, the plaintiff having the right to use machinery, bolting, &c., &c., then in said mill that should be found to be in proper condition for use, except what was in use on the rye and feed side of said mill; the said fixtures and apparatus to be new and first-class in every way and of the latest patent, except as above specified, and to be completed and put in complete running order within ninety days from the date of said agreement.

The said sum of $9,000 was to be paid, by the terms of said agreement, for said mill fixtures complete as aforesaid, put in the said mill as aforesaid in manner following—that is to say: $3,000 on the arrival of said machinery at the said mill of the defendant at Delavan; $4,000 when said mill should be completed and in running order so as to do as good work as other mills of the same kind, and
7 the balance of $2,000 ninety days after the completion of said mill.

And the complaint further shows and alleges that, pursuant to said agreement, said machinery, fixtures, and property were manufactured and prepared for the defendant and were shipped at Dayton aforesaid by the plaintiff to and for the defendant to Delavan aforesaid, on or about the 22nd day of August, A. D. 1883, and was, in due course of transportation by rail, received by the defendant at Delavan aforesaid, and were with all reasonable and requisite dispatch put into complete operation by the plaintiff in accordance with the terms and requirements of said agreement; that the plaintiff did on its part every act and thing required by the said contract in and about the manufacture and setting up and putting into actual and complete operation the machinery, fixtures, &c., mentioned in and covered by said contract.

That thereafter and on the 4th day of September, A. D., 1883, the defendant paid the plaintiff on the said agreement the first instalment of $3,000; that on the first day of November, A. D. 1883, the defendant paid in freights to be applied on said contract the sum of $172.47, and on the 8th day of February, A. D. 1884, the
8 sum of $100 to be applied on said contract, and that these three sums, amounting in the aggregate to $3,272.47, constitute all that has been paid thereon, leaving the sum of $5,727.53 unpaid and due and owing from the defendant to the plaintiff on account of the premises.

That the defendant has declined and refused, and still does decline and refuse, to pay said last-named sum.

The plaintiff further alleges that the defendant is by reason of the premises justly indebted to the plaintiff in the sum of $5,727.53, with interest on all sums unpaid from the time when the same were due under said contract, for which sum the plaintiff demands judgment against the defendant with costs.

G. W. HAZELTON,
*Pl'ff's Att'y.*

*Summons & Complaint Returned.*

"I hereby depute Albert Fink to serve and make return of this writ.
Ap'l 21, '84.

HENRY FINK,
*U. S. Marshal.*

Served on the within-named Amos Phelps by showing him this summons and complaint and by delivering to him personally a copy thereof this 22nd day of April, A. D. 1884.

HENRY FINK, *Marshal,*
By ALBERT FINK,
*Special Deputy.*

Fees, $6.76.

The foregoing return subscribed and sworn to before me this 23d day of April, 1884.

EDW. KURTZ,
*Clerk U. S. Circuit Court, E. Dist. Wis.*"

9 June 12, 1884.—This day came the defendant, by his attorneys, Messrs. Fish & Dodge, and filed his answer as follows:

United States Circuit Court, Eastern Dist. of Wisconsin.

STILLWELL & BIERCE MANUFACTURING COMPANY, Plaintiff,
*against*
AMOS PHELPS, Defendant.

The defendant above named, for answer to the complaint of the plaintiff, admits the allegations of said complaint as to residence of the plaintiff and defendant.

He denies that on May 30th, 1883, or at any other time, the plaintiff and defendant entered into such contract as is set forth in the complaint or any contract whatever, save and except a certain written contract, of which a copy is hereto annexed, marked Exhibit "A."

Defendant admits that plaintiff shipped certain machinery to Delavan, Wisconsin, and he admits that he has paid to the plaintiff to apply on said contract the several sums mentioned in the complaint.

And, except as in this his answer otherwise stated, the defendant denies each and every allegation in said complaint contained.

10 And the defendant, for further answer and defence, alleges that in addition to the several sums above mentioned he has paid to others and paid for materials and labor upon plaintiff's order and to apply upon said contract the sum of five hundred eleven & $\frac{59}{100}$ dollars, of which a particular statement is hereunto annexed, marked Exhibit "B," and for which defendant is

entitled to credit upon said contract; and this defendant further alleges that the plaintiff has failed and neglected to perform said contract on its part, and has never completed the mill and put it in running order, as required by said contract.

And this defendant, further answering and by way of counter-claim, shows unto the court and alleges that on and for a long time prior to May 30th, 1883, the plaintiff above named was and had been engaged in the business of manufacturing, dealing in, and constructing machinery and apparatus for flouring mills upon what is known as the roller system, and in reconstructing and refitting existing mills and converting them from the system of grinding grain by stones to the roller system of making flour, and claimed to have full knowledge of all matters and things relating to their said business; that on said May 30th this defendant was and for many years had been the owner of and engaged in running a water-power flour and feed mill, at Delavan, in the State of Wisconsin, constructed for the manufacture of flour by means of stones, of the value of at
11 least $30,000, and had a large and well-established business in manufacturing and selling flour and feed at said Delavan and vicinity, and had established a large market for the products of his said mill, which he was able to control so long as he could supply its demands, but which must necessarily be lost to defendant in case of the disablement of his mill for any considerable time; of all of which facts the plaintiff at and prior to said May 30th, 1883, had full knowledge and information.

That defendant was not familiar with the process of manufacturing flour by the roller process nor with the machinery necessary therefor, as plaintiff well knew; that plaintiff then represented to defendant that the machinery, apparatus, and appliances by it contracted to be placed in defendant's said mill were well adapted for and, when completed and in running order, would constitute a full, adequate, and sufficient plant and equipment for the manufacture of flour by the roller system, and would manufacture as good flour as any other roller mills.

That this defendant, relying upon said representations of the plaintiff, entered into the written contract of which a copy is hereto annexed, marked "Exhibit A."

That thereupon the plaintiff tore out and removed from said mill the machinery of the defendant and proceeded to replace it with other machinery, in pretended compliance with said
12 contract, but prosecuted said work in so negligent and dilatory a manner that the same continued up to about February 1st, 1884, when plaintiff claimed that said mill was completed.

That said milling machinery and apparatus so constructed by plaintiffs was defective and insufficient in manufacture and design, and would not produce good or marketable flour, although defendant tested it thoroughly with the best wheat and the best expert assistance he could obtain.

And, relying on plaintiff's statement that said mill would produce as good flour as other roller mills, defendant placed the flour turned out thereby on the market among his regular customers, but found

that the same was of poor quality and greatly inferior to that produced by other roller mills and wholly unsaleable.

That immediately upon learning of such defects defendant notified plaintiff and demanded that it complete said mill and remedy said defects, which it has wholly failed and neglected and still refuses to do.

That, by reason of the failure of plaintiff to fulfill its said contract at the time therein specified, defendant has wholly lost the use of his flouring mill from the 30th day of August up to and including the present time, and, as he is informed and believes, will be de-
13 prived thereof until about July 1st, 1884, which said use is of the net value to defendant of not less than $700 per month.

That, in attempting to run said mill, large quantities of wheat have been damaged and rendered of little value.

That, after giving plaintiff due opportunity to complete said mill and remedy its defects, defendant, on or about April 2d, 1884, in order to lessen his damages from further delay, notified plaintiff that, unless it proceeded within ten days to so complete said mill, he, the defendant, should proceed to complete the same and charge the expense to the plaintiff; that, plaintiff failing to act upon said notice or take any steps to complete said mill, defendant, on or about April 14th, employed workmen and proceeded to complete said mill and put it in running order to comply with the requirements of said contract, and has prosecuted said work diligently ever since, and with all due diligence will be unable to complete the same until about July 1st, 1884; that in said work defendant has already paid or incurred as cost thereof, up to the present time, the sum of $1,821.89, and in order to complete said mill will be obliged to pay at least the further sum of $350.

14 Defendant further alleges that, by reason of the disablement of his said mill by reason of the delay of plaintiff in completing its said contract and his consequent inability to supply his customers with flour, and by reason of the poor quality of the flour produced by said mill and placed on the market as aforesaid, defendant's business has been greatly injured and the market for flour from his mill in great measure destroyed, whereby he has suffered damage in at least the sum of two thousand dollars.

And defendant further alleges that, by reason of plaintiff's failure to perform its said contract he has suffered damages as follows, viz: From the loss of the use of his flouring mill, as above stated, he has suffered damage in the sum of $7,000; from the injury to and loss of wheat, as above stated, he has suffered damage in the sum of six hundred dollars; from the insufficiency and incompleteness of said mill he has been further damaged the cost of completing the same, to wit, the sum of $2,171.89, and from damage to his business and loss of his market he has suffered damage in the sum of $2.000.

Wherefore he prays that plaintiff recover nothing by its complaint, and that defendant recover from plaintiff the sum of
15 eleven thousand seven hundred seventy-one & $\frac{89}{100}$ dollars, his damages as aforesaid, and the costs of this action.

FISH & DODGE,
*Def't's Attorneys.*

EASTERN DISTRICT OF WISCONSIN, } ss:
*Racine County,* }

Amos Phelps, being duly sworn, says he is the defendant who makes the foregoing answer, and that the same is true of his own knowledge, except as to matters therein stated upon information and belief, and as to those matters he believes it to be true.

AMOS PHELPS.

Subscribed & sworn to before me this June 12, 1884.

J. E. DODGE,
*Notary Public in & for Racine County Aforesaid.*

EXHIBIT "A."

Articles of agreement made and entered into this 30th day of May, A. D. 1883, by and between the Stilwell and Bierce Manufacturing Company of Dayton, Ohio, of the first part, and Amos Phelps, of Delavan, Wisconsin, of the second part, witnesseth as follows, to wit:

For and in consideration of the sum of nine thousand dollars ($9,000), to be paid by the second party as hereinafter specified, the party of the first part covenants and agrees to furnish and put in complete operation for the second party, in his flouring mill at Del-
avan aforesaid, one first-class seventy-five-barrel capacity
16 roller mill, complete, including one six-break concentrated mill, 9 x 18; one double 9 x 18 scratch roll; two double 9 x 18 smooth rolls; three No. 3 Excelsior purifiers (if they are now made, otherwise three No. 0 Geo. T. Smith purifiers); one No. 2 centrifugal bed; one No. 1 bran-duster; two No. 3 dust-collector-, with fans; one Barnard & Lee's mill separator, 30 to 40 bushel capacity; one 4-bed bolting chest, 32 x 16 (or all necessary bolting chests that may be necessary for a complete job), with one extra smutting garner and two garner- over first break, holding about 75 bushels each, and necessary bolting cloth, *are* to be new; the first party to use all machinery, belting, &c., &c., now in said flouring mill that is in proper condition for use, except what is now in use on the rye and feed side of said mill; all of said mill, machinery, fixtures, and apparatus to be new and first class in every way and of latest pattern, except as above specified, and to be completed and put in complete running order within ninety (90) days from the date hereof.

And the said party of the second part covenants and agrees on his part to pay to the first party for the said mill fixtures, &c., complete, as above specified, and put in complete operation in his flour-
ing mill at Delavan aforesaid, the sum of nine thousand
17 dollars ($9,000), payable as follows, to wit:

Three thousand dollars ($3,000) upon the arrival of said mill and machinery at his mill in Delavan, four thousand dollars ($4,000) when said mill is completed and in running order to the satisfaction of the second party, and the balance, two thousand dollars ($2,000), within ninety (90) days after the completion of the

said mill as aforesaid, first party to start the mill and see that it is in complete running order.

In witness whereof the said parties have hereunto set their hands and seals on the day and year first above written.

In duplicate.

STILLWELL & BIERCE M'F'G CO., [SEAL.]
By GEO. C. TUTJERS, *Agent.*
AMOS PHELPS. [SEAL.]

Witness-:
J. M. RITTER.
H. T. SHARP.

EXHIBIT "B."

*Schedule of Bills Paid on Plaintiff's Request.*

| | | | | |
|---|---|---|---|---|
| 1883. | | | | |
| Nov. | 1. | For lumber | | 7 91 |
| | 3. | " express on roll | | 25 |
| | 9. | " freight from mill | | 1 27 |
| | 13. | " lumber, &c. | | 13 05 |
| | " | " 1 gross screws | | 50 |
| | 17. | " shafting | | 1 77 |
| | 21. | " belting—Gardner's bill | | 7 98 |
| | 16. | " E. P. Allis bill, castings, &c. | | 67 77 |
| | 23. | " lumber, 6.36; gros- screws, .50 | | 6 86 |
| | 30. | " Vanvelser's bill—bolts, files, & keys | | 2 25 |
| 18 | Dec. 2d. | For lumber, .65; screws & nuts, .50 | | 1 15 |
| | " 5. | " belting—Gardner's bill | | 3 88 |
| Dec. | 7. | For h'dware—Hollister & Jackson's bill | | 6 35 |
| | " | men's wages: J. Cottingham | | 127 56 |
| | | M. Cottingham | | 69 50 |
| | | M. T. Harrington | | 85 15 |
| | | Coleman | | 24 |
| | | A. Keeler | | 3 |
| | | Ed. Johnson | | 16 88 |
| | " | lumber & nails | | 1 75 |
| " | 18. " | Delavan machine-shop bill | | 9 30 |
| | " | board furnished J. & M. Cottingham @ $4 | | 48 50 |
| | " | lace leather | | 2 |
| | " | lumber & screws—Barker's bill | | 2 97 |
| | | | | $211 60 |

JUNE 25, 1884.

This day came the plaintiff, by its attorneys, and filed its reply as follows:

*Reply.*

In the United States Circuit Court, Eastern District of Wisconsin.

STILLWELL AND BIERCE MANUF'G COMPANY *vs.* AMOS PHELPS.

The plaintiff, for reply to the counter-claim of the defendant in

this action, denies the same and each and every allegation, matter, and thing in that behalf alleged on the part of the defendant.

G. W. HAZELTON,
*Pl'tff's Att'y.*

To Fish & Dodge, Esq., def't's att'ys.

19 SOUTHERN DISTRICT OF OHIO, *ss:*

G. N. Bierce, being duly sworn, says he has read the foregoing reply and knows the contents thereof, and that the same is true of his own knowledge except as to those matters stated, on information and belief, and as to those matters he believes the same to be true; that affiant is a member of the plaintiff company and one of the officers and managers thereof.

G. N. BIERCE.

Subscribed & sworn to before me this 23d day of June, 1884.
[SEAL.] WEBSTER U. SHUEY,
*Notary Public, Montgomery County, Ohio.*

September 6, 1884.—Plaintiff's notice of trial for the October term, 1884, filed.

December 9, 1884.—Plaintiff's notice of trial for the January term, 1885, filed.

And same day defendant's notice of trial for the January term, 1885, filed.

*Trial.*

And now, at this same term, to wit, January term, 1885, and on the thirty-sixth day thereof, to wit, on the nineteenth day of February, A. D. 1885, the following proceedings were had, to wit:

20 STILWELL AND BIERCE MANUFACTURING COMPANY
*vs.*
AMOS PHELPS.

This day came the parties, by their counsel, Mr. G. W. Hazelton appearing for the plaintiff, and Mr. John T. Fish for the defendant and the issue herein came on to be tried; whereupon a jury was called to try the same, who came, to wit, Q. A. Matthews, Frank. H. Birchard, A. H. Cleveland, Andrew Argus, Hamilton Vose, E. G. Hayden, Adam Truss, Frank Drabos, John M. Furlong, William G. Taylor, Gilbert H. Smith, and Thomas Nelson, twelve free, honest, and lawful men of the district, who were severally sworn and empannelled, and the trial not being concluded, the same was adjourned until to-morrow morning.

February 20, 1885.—This day came the parties, by their counsel, and also the said jurors of the jury, and the trial of the issue herein was resumed, and, not being concluded, the same was adjourned until to-morrow morning.

February 21, 1885.—This day came the parties, by their counsel, and also the said jurors of the jury, and the trial of the issue herein

was resumed, and, not being concluded, the same was adjourned until Monday morning next.

21 February 23, 1885.—This day came the parties, by their counsel, and also the said jurors of the jury, and the trial of the issue herein was resumed, and, not being concluded, the same was adjourned until to-morrow morning.

February 24, 1885.—This day came the parties, by their counsel, and also the said jurors of the jury, and the trial of the issue herein was resumed, and, not being concluded, the same was adjourned until to-morrow morning.

February 25, 1885.—This day came the parties, by their counsel, and also the said jurors of the jury, and the trial of the issue herein was resumed, and, not being concluded, the same was adjourned until to-morrow morning.

February 26, 1885.—This day came the parties, by their counsel, and also the said jurors of the jury, and the trial of the issue herein was resumed, and, not being concluded, the same was adjourned until to-morrow morning.

February 27, 1885.—This day came the parties, by their counsel, and also the said jurors of the jury, and the trial of the issue herein was resumed, and, not being concluded, the same was adjourned until to-morrow morning.

22 February 28, 1885.—This day came the parties, by their counsel, and also the said jurors of the jury, and the trial of the issue herein was resumed, and, not being concluded, the same was adjourned until Monday morning next.

March 2, 1885.—This day came the parties, by their counsel, and also the said jurors of the jury, and the trial of the issue herein was resumed; and the jurors of the jury aforesaid, being charged by the court, retired to their room, under the charge of a sworn officer, to deliberate upon their verdict, and with leave to bring in a sealed verdict to-morrow morning.

*Verdict.*

March 3, 1885.—This day came the parties, by their counsel, and the jurors of the jury aforesaid came into court with a sealed verdict, and, on their said oaths, respectively, do say that they find the issue herein in favor of the defendant, but that the defendant is not entitled to recover damages against the plaintiff in excess of the plaintiff's claim against the defendant; and came the plaintiff's counsel and moved the court for a new trial for reasons filed, as follows:

*Motion for New Trial.*

In the U. S. Circuit Court, Eastern District of Wisconsin.

STILWELL & BIERCE MANU'F'G CO. *vs.* AMOS PHELPS.

23 The plaintiff now comes and moves the court to set aside the verdict and to grant a new trial in this action for the following reasons:

1st. That the verdict is against the evidence.

2. That the verdict is against the law.
3. That the jury ignored the evidence on the part of the plaintiff.
4. That the jury allowed the defendant for $1,100 worth of new machinery put into the mill under the claim & guise of conforming the machinery in the mill to the contract.
5. The jury disregarded the charge of the court, and that undue methods were employed by and on behalf of the defendant to influence the result.
6. That errors were committed in the admission of evidence on the part of the defendant and excluding evidence on the part of the plaintiff.
7. On account of errors in the charge of the court.
8. That the verdict is against the right & justice of the case and not supported by the testimony.

G. W. HAZELTON,
*Pl'ff's Att'y.*

23½ March 19, 1885.—Affidavit of G. N. Bierce in support of plaintiff's motion for a new trial filed as follows, to wit:

*Affidavit of G. N. Bierce in Support of Motion for New Trial.*

In the U. S. Circuit Court, Eastern District of Wisconsin.

STILWELL & BIERCE MANUFACTURING CO. *vs.* AMOS PHELPS.

SOUTHERN DISTRICT OF OHIO, *ss:*

G. N. Bierce, one of the members of the plaintiff company, being duly sworn, says he was present at the trial of the above cause; that when the plaintiff's rebutting testimony was being submitted, and while a comparative test was being made of the flour produced by the defendant's miller, Hicks, with the machinery as overhauled and changed by him, and a sample of the flour produced by the plaintiff with the machinery before being so overhauled, and the result of such test was being submitted to the jury, the said Hicks declared, in the presence and hearing of the jury, that the flour used by the plaintiff in making such test was not the flour pro-
23¾ duced by the plaintiff, as alleged, thus charging the plaintiff in the hearing of the jury with fraudulently substituting other flour for that produced by the plaintiff, as alleged, for the purpose of deceiving the jury.

That said remark was not made in answer to an interrogatory from either of the attorneys or any one else, nor was it made from the witness stand, so as to be taken down by the reporter and included in the testimony of the said Hicks, but was a voluntary assertion made by the said Hicks, who had already testified at length on behalf of the defendant for the purpose of influencing the jury and impairing the effect of such test.

That the said remark was absolutely false and had not the slightest basis of truth to support it, and was made under such circumstances as to necessarily have an influence with the jury, and that

one of the jurymen a short time thereafter remarked to another juryman that the samples introduced ought to be kept in court, and the plaintiff's attorney at once, on hearing the remark, called the attention of the court to it.

G. N. BIERCE.

Subscribed & sworn to before me this 17th day of March, 1885.

24 GRAFTON C. KENNEDY,
*U. S. Commissioner, S. D. O.*

April 16, 1885.—This day the motion of the plaintiff's counsel for a new trial came on to be heard, and was argued by Mr. Hazelton in favor of the same, and by Mr. Fish in opposition, and, the hearing being concluded, the court took the same under consideration.

And afterwards, to wit, on the eighty-eighth day of said term, to wit, on the 13th day of May, A. D. 1885, the following proceedings were had, to wit:

*Order Overruling Motion for New Trial and Judgment vs. Pl'ff for Costs.*

STILWELL AND BIERCE MANUFACTURING COMPANY
*vs.*
AMOS PHELPS. } At Law.

This day came the parties, by their counsel, and on consideration of the motion of the plaintiff's counsel for a new trial and the arguments of counsel thereon, it is ordered by the court that the said motion be, and hereby is, overruled.

Whereupon it is considered and adjudged by this court now here that the plaintiff take nothing by its writ, and that the defendant do have and recover of the said plaintiff, The Stilwell and Bierce Manufacturing Company, two hundred and twenty-five dollars and sixty cents, his costs about his said defense in this behalf by
25 him expended, and that he have execution therefor.

Judgment roll signed May 13th, A. D. 1885.

Costs, $225.60.

EDWARD KURTZ, *Clerk.*

July 11, 1885.—Bill of exceptions signed and filed as follows:

*Bill of Exceptions.*

In the United States Circuit Court, Eastern District of Wisconsin.

THE STILWELL & BIERCE MANUFACTURING COMPANY
*vs.*
AMOS PHELPS.

The cause being reached and called for trial and a jury being empannelled and sworn therein, the plaintiff put in evidence the

contract mentioned and referred to in the complaint, which is in the words and figures following, to wit:

"Articles of agreement made and entered into this 30th day of May, 1883, by and between the Stilwell and Bierce Manufacturing Company of Dayton, Ohio, of the first part, and Amos Phelps, of Delavan, Wisconsin, of the second part.

For and in consideration of the sum of nine thousand dollars ($9,000), to be paid by the second party as hereinafter specified, the party of the first part covenants and agrees to fur-
26 nish and put in complete operation for the second party, in his flouring mill at Delavan aforesaid, one first-class seventy-five-barrel capacity roller mill complete, including one six-break concentrated mill, 9 x 18; one double 9 x 18 scratch rolls; three No. 3 Excelsior purifiers (if they are now made), otherwise three No. 0, G. F. Smith's purifiers; one No. 2 centrifugal reel; one No. 1 bran-duster; two No. 3 dust-collectors, with fans; one Barnard & Lee's mill separator, 30 to 40 bushel capacity; one four-reel bolting chest, 30 x 16 (or all bolting chests that may be necessary for a complete job), with one extra smutting garner, and one garner over first break, holding about 75 bushels each, and necessary bolting cloth, all to be new; the first party to use machinery, belting, &c., &c., now in said flouring mill that is in proper condition for use, except what is now in use on the rye & feed side of said mill; all of said mill machinery, fixtures, and apparatus to be new and first-class in every way and of latest patent, except as above specified, and to be completed and put in complete running order within 90 days from the date hereof.

And the said party of the second part covenants and
27 agrees on his part to pay to the said firstparty for the said mill fixtures, complete and as above specified, and put in complete operation in his flouring mill at Delavan aforesaid, the sum of nine thousand dollars ($9,000), payable as follows, to wit, three thousand dollars ($3,000) upon the arrival of said mill and machinery at his mill in Delavan, four thousand dollars ($4,000) when said mill is complete and in running order to the satisfaction of the second party, and the balance, two thousand dollars ($2,000), within ninety days after the completion of said mill as aforesaid, first party to start the mill and see that it is in complete running order.

In witness whereof the said parties have hereunto set their hands and seals on the day and year first above written.

(In duplicate.)

STILWELL & BIERCE MAN'F'G CO., [SEAL.]
By GEO. C. TUTJEN, *Ag't.*
AMOS PHELPS.

Witness:
J. M. RITTER.
H. T. SHARP."

Witnesses were then called by the plaintiff, who gave testimony tending to show that the work was done and the machinery placed

in said mill pursuant to and in compliance with the terms of said contract, except that there was a delay of several weeks in the time of completing the job, a part of which was claimed to be chargeable to the fault of the defendant.

28 G. N. Bierce, on behalf of the plaintiff, was sworn as a witness and testified that he was present with others when the mill was being tested to see whether it operated satisfactorily the forepart of February, 1884, and at that time took and preserved samples of the wheat, the flour, the middlings, and bran for the purpose of showing the work done by the said mill from the material used.

These samples, produced on the trial, were exhibited to the jury and examined, and expert testimony was offered and submitted in respect to the same, and a number of other witnesses were sworn and examined on the part of the plaintiff, whose testimony tended to show that the machinery was first class and capable of doing first-class work.

On the question of rental value of the mill in question, having reference to the delay in getting same started, the plaintiff called, among other witnesses, one Charles Geissner, who, being sworn, testified that he was the owner and manager of a roller flouring mill of about seventy-five to a hundred barrels capacity per twenty-four hours, in the county of Waukesha and near Waukesha village; that he had owned and run said mill for several years and was

29 personally acquainted with the milling business and familiar with roller mills; that the county of Waukesha adjoins that of Walworth, in which the mill in question is located, but that he had never seen the said mill; that he had never been in Delavan, and knew nothing from personal observation or knowledge of the extent of the custom work of the mill, its business, or product, nor of the water-power.

He was then asked to state the rental value of the mill in question, in his judgment, during the period in question.

The question was objected to, because the witness had never seen and had no personal knowledge of the property in question, and was therefore incompetent to testify as to rental value.

The court sustained the objection, and the plaintiff excepted to such ruling of the court.

The witness was then asked to state such rental value upon the supposition that the said mill had a good water-power and all the business it could attend to, as claimed by the defendant, and a capacity of manufacturing seventy-five barrels per day.

To this question the same objection was raised, and sustained by the court, and plaintiff excepted as above.

30 The plaintiff rested.

And the defendant called and examined a number of witnesses to sustain the allegations of his answer herein, and to show that the machinery and work furnished by the plaintiff were not in compliance with the contract, and did not and would not operate satisfactorily.

The testimony of these witnesses tended to show that the mill, as constructed by the plaintiff and the machinery placed therein by the plaintiff, did not and would not do as good work as other roller mills of seventy-five barrels capacity, and some of said testimony tended to show that it was necessary, in order to enable it to do such work, to put in the mill the new machinery specified in the answer, which, it was shown, cost $1,100, and there was also evidence on the part of the defendant to the effect that the expense of putting the mill in condition so as to do as good work as other roller mills of 75 barrels capacity was $2,772.

Among other witnesses, one Hicks was called, who testified:

Levi Hicks; reside in Delavan; am a miller; have been engaged in that business from my youth, with the exception of the time I received my education; first commenced the milling
31 business as a miller in 1870; had, prior to that time, learned my trade; was in a mill working as a miller most of the time for my father and other parties; was brought up as a miller, except when I was going to school; have been acquainted with the roller system of milling since its first introduction into the country.

I first went to the Delavan mills on or about the 7th of February, I believe, with Mr. Bierce and Mr. Barkham. They were running when I went in, or shortly after I went in they started. I saw that the mill was in operation, and was asked to look around by Mr. Bierce, and I did so. The motion seemed to be sufficient, the reels seemed to be having speed enough, the indicator that indicated the speed fluctuated, but there seemed to be sufficient motion. I looked at some of the various stocks of wheat and its product as it passed through the spouts, and also the rolls. I thought the rolls were laboring hard enough to do good work. My impression was they were running too close. They were jumping; they acted as if they were taking the same speed, where they ought to have some differential speed—that is, one roll following a little faster than the other, and this jumping action indicates the belt slips sometimes and catches again, showing the rolls must be very close to-
32 gether, with the width of the belt pulleys, &c., considered. The effect upon the stock would be to pulverize it so fine. On some rolls it would be very injurious; on other rolls, depending on what was required of that roll, it might be all right. Another indication that the rolls were being run too tight was that the surface of the rolls was very hot. That would indicate heavy friction. It is my opinion that the object of running them so close was to finish the feed—to finish the stock. I examined the stock first and saw that by the indication of the rolls and the way they were working it was to finish, if possible, the stock closely. It is not proper to run rolls in that way, so close, in nine cases out of ten. I observed with reference to the stock it had not been properly purified; the impurities had not been taken out and was passed to creased rolls. I pulverized these impure particles, and when it came in contact with the roll it was bolted through into the flour—the impurities were. I went there about half past 12. We got to the mill about one and

run until about four; possibly five. They did not run, to my knowledge, after that. I went with the same parties back to the mill again. Of course, they could have run longer if they wanted to. I don't know whether they ran the next day; I came home
33 that night. I returned to the mill the 3d of March.

Q. In what condition did you find the mill when you returned—as to its condition when it was shut down that day when you went to the hotel?

A. It was shut down when I went there.

Q. Apparently, had it been started?

Objected to; answered subject to the objection.

A. I don't believe it was.

COURT: Let him state whether, in his opinion, from its appearance when he saw it, it had been previously run.

A. No, sir; I should say it had not. When I went there on the 3rd of March I was handed a diagram of the mill; that is the same diagram that was given to me. I came there to run the mill, if I could—if I thought it possible to run it. I looked it over with the diagram, and followed out each spout—where it led to and came from; and, after I thought I was thoroughly enough acquainted with the diagram to start the mill, I done it. When I started up, put the water on the wheel, and set the rolls going just as they had been left—they are manufactured and set in such a way you take one lever and throw the rolls apart, both on the break rolls and others, one lever handles each set of four rolls—by the person previous I found they were too close. I found also the stock
34 from the rolls, which I have a sample of just as I found it, was impure. I found the breaks not in proper order. The breaks are the part of the system that handle the wheat and continually break it down in the gradual reduction system with six operations, and a separation between each action of the rolls. They were not right. I examined the purifiers and bolts, dust-collectors, &c., centrifugal bran-duster, &c., all through. I tried to make flour with the mill three different times. I came to the conclusion I could not do it. I told Mr. Phelps so at the time, that I could not make good flour and good results—clean feed. By clean feed I mean taking comparatively good wheat to make a barrel of flour out of from 4.30 to 4.45; that would be a fair result, although I never take that. I mean when I say the feed was not clean the shorts—the bran was overdone—the shorts was not clean. There was considerable shorts that ought to have been reduced and would make first-class flour. I examined some of the shorts that were there in the mill to see how rich they were. I found them very rich, and it was a down-hill business—that is, it was a losing scheme, I thought. The mill could not be run in that condition, making that kind of shorts and flour, without a severe loss—quite a loss—a loss that would run the proprietors poor in three months.

35 Q. What did you deem to be necessary in order to make that a first-class mill?

A. A general overhauling, because it had started wrong, got off its track in the beginning; consequently I had to begin at the beginning.

Q. Was the mill in such condition that it could be controlled and used in any other way than as you have stated here—that is, as to the result?

Objected to.

A. No, sir. I told Mr. Phelps I could not make good flour and clean feed. After the time expired for the plaintiffs to adjust the mill I began to make a diagram of the mill as I thought it should be, and went ahead accordingly, after we got the plans completed and Mr. Phelps got Montague, the millwright. Montague looked it over while it was being run—examined it carefully. I think he was there at one of the times when we were running the mill to make a test of it.

I prepared a diagram showing what I thought ought to be done in order to make a good mill. I did not put anything upon that diagram—anything which could be dispensed with and make it a first-class mill to do first-class work. When Montague came and was employed the mill was reconstructed in accordance with my diagram. It was completed about the last of July. After the mill was reconstructed by Montague we started up to run.

36 We started up carefully at first and ran it without any feed most of the first day; got everything oiled up and run it a while to see there was no boxes heating, &c.; then I put the feed on the rolls. I connected the rolls and the reduction part and smutted up the wheat.

Q. State what the result was of the test.

A. My conclusion was I found no trouble; made flour that went out as exchange to farmers—that went out and staid; it didn't come back.

Q. What was the result of that put on the market?

A. A good many spoke well of it. I had samples of Beloit flour, Geneva Lake, Oconomowoc, Fairbault, Minn., and Douglas mill; some of mine when I was in the Empire mill; some of the Reliance mill flour here in the city. I compared it all around with each grade. I considered it just as good.

On cross-examination he testified as follows:

I prepared a diagram for a roller mill before this—the Empire mill in this city, in 1882. They had partially a roller system. I used the rolls that was there; did not overhaul the machinery; overhauled the system and the run of the stock and manufacture of flour in the machinery. I have prepared a great many diagrams, but they are not in operation—merely for my own study. I furnished a diagram for the construction of Volk Brothers' mill

37 at Wilmot Station, in this State, in January, 1883. That was the second one. I was informed by Mr. Wilmot my diagram was used.

This witness produced and exhibited to the jury and testified in regard to the flour produced by the mill after its reconstruction, and commented on the same as an expert.

He also exhibited samples of flour and of offal claimed to have been produced by the machinery before reconstruction, and which he testified were taken by him from the mill after grinding was done in February and before the mill was again started, and made comparative tests of the same before the jury.

The defendant made proof of the following notice, served on the plaintiff's attorney before the mill was overhauled, and on the first of April, 1884: "If your clients do not within ten days proceed to put the mill in repair so that it will do good work, Mr. Phelps will employ the best millwrights he can obtain and put the mill in order and charge the expense to your clients."

After the time mentioned in this notice had expired the defendant proceeded to overhaul the mill and reconstructed the same on Hicks' programme, completing the work some time in August, 1884.

38 While Hicks was on the witness stand he produced and exhibited to the jury, as evidence that the machinery, as he found it, would not do good work, samples of material which were being carried to one pair of rolls. The testimony of the said Hicks upon this subject was as follows:

HICKS (re-examined by Mr. FISH):

I have samples of the material that was passing onto these sizing rolls at the time I took the mill. I will exhibit them to the jury. That is some of the material. There is the tail end of the No. 2 & 3 purifier—Notbohm machine. That was going onto the second-sizing roll on the old diagram. Those two stocks were going on the same roll. It goes to show the purifiers were not doing their duty. This was going onto a roll. Now, in order to accomplish what must be accomplished, if I set the roll to do justice to that work, I pulverize that; if I handle that on the roll, as it was going here, it was wrong; if I handle that carefully, to not pulverize, I neglect that. It must be one or the other. If I set it close, in order to clean that, this would be pulverized to a certain extent, and bolt in with the flour again, causing that redness of the flour. This is just as I found the mill before I had touched a stick or lever or wheel of any description. This is considered a low-grade stock in

39 this case, where there is as nice flour in there as can be produced in any mill properly handled; that went to the low-grade roll; that was a creased roll. If you done justice to the impurities in there you neglected the other. It was impossible to do justice to both, there being so much impurities in there; there is more or less in any stock. You can't get perfection in this thing any more than in any other, but you can get far nearer to it than that. There is the cut-off from No. 5 purifier that was going with this stock also and this. Them three stocks were going in the same roll.

(To Mr. HAZELTON:) I did not separate it; that is the way I found it. I did not find it all in the same place of deposit. I found the three spouts that came in there were so that they went in different places. This I found at the tail end of the purifier; it must go there; it could not go anywhere else. That I found in the tail end of No. 2 machine and 3. This I found in the cut-off.

(To Mr. FISH:) They all ran to the same roll. That was the tail end of 2 & 3.

Q. What was on the tail end?

A. No. 5. You see that was neglected there. If it had been properly handled there—the impurities taken out—there would
40 not have been half as much here. Those three stocks were being treated by the same set of rolls at the same time.

A large number of witnesses *was* called by defendant to show that the plaintiff had not provided the defendant with a mill that would do as good work as any other roller mill of 75 barrels capacity, and that good work could not be done with it, and that the reconstruction was necessary and the same was properly done.

After defendant rested the plaintiff called as a witness the foreman of the Phœnix mills of the city of Milwaukee in rebuttal of the evidence introduced by the defendant, who testified that the Phœnix mill was a roller mill, located in the city of Milwaukee, of a capacity of about one thousand barrels per day, being one of the leading mills of the city, and that he had been the foreman at that mill for several years. He was then asked to produce and exhibit to the jury a sample of material which he had procured at the Phœnix mill, and had brought into court for the purpose of demonstrating that material as diverse as that produced by the witness Hicks was carried to and handled by one set of rolls at said
41 Phœnix mill and was deemed proper.

This was objected to by the defendant, and was excluded by the court on the ground that *that* it was introducing an issue in regard to another mill; to which ruling of the court plaintiff excepted; but the plaintiff was permitted to give testimony as to whether it was proper or not to carry the materiai produced in court by Hicks to one set of rolls to be treated together.

Certain witnesses, experts, were sworn to show and establish that if the mill had the defects specified by defendant's witnesses that such defects related simply to matters of detail that could be easily remedied at slight expense, and did not call for or justify a general overhauling or reconstruction of the mill.

Mr. G. N. Bierce was then recalled to the witness stand by the plaintiff for the purpose, among other things, of making a comparative test in the presence of the jury of the flour claimed to have been produced by the mill in question, while the plaintiff was testing it, as before stated, in February, 1884, and also claimed to be a part of the same sample previously shown to the jury as aforesaid, and the flour claimed to have been produced by the witness Hicks
42 after the mill was reconstructed according to his programme.

While this witness was proceeding with this test the said Hicks came inside the bar and advanced to the place where the jury and counsel were gathered about the witness, looked at and handled the sample of flour procured and produced by the witness Bierce, and thereupon affirmed in distinct terms, in the presence and hearing of the jury and the counsel, that the flour had been changed, and that the witness was not using the same flour in this test as that previously shown the jury.

The record of the reporter's minutes reads as follows:

Defendant objects to the plaintiff making any other test of the flour.

COURT: Is the flour you have the same flour you exhibited when you had the case?

PLAINTIFF'S COUNSEL: It is the same flour; it has been in my hands ever since.

COURT: This is the real question: You (referring to defendant) having exhibited a sample of flour you have made from the mill since it has been reconstructed, so to speak, have they not the right upon rebuttal to put by the side of that flour flour which they say they made from the mill before it was reconstructed?

43 DEFENDANT'S COUNSEL: I insist not.

Objection overruled; exception by defendant.

Mr. Bierce makes the test.

Mr. BIERCE (having the two samples before him): This is made after the summer; ours was made in February.

(At this point occurred the circumstance described.)

PLAINTIFF'S COUNSEL: Your honor, Mr. Hicks handles this flour in the presence of the jury, and says that our flour is a fraud, and that it was not made a year ago, when Mr. Bierce says under oath that it was. Mr. Hicks stands here and in the presence of the jury says it is a fraud.

COURT: The jury will not regard it.

Within a few moments thereafter the plaintiff's counsel overheard one of the jury say to another juryman that the samples of flour ought not to be taken out of the court-room, and at once called the attention of the court to what he had so overheard in the presence of the jury and of opposing counsel.

After the cause was tried and before the motion for a new trial was argued the plaintiff filed an affidavit of said G. N. Bierce on behalf of the plaintiff, setting forth the above occurrence, which affidavit is of file herein.

44 The plaintiff requested the court to charge that the plaintiff was entitled to a fair test of the machinery put into defendant's mill, and that nothing short of that would justify its condemnation. Such a test requires an ample power to operate the machinery to the best advantage, and this means the whole of the machinery, if the jury find that the machinery was designed and intended to be operated together.

It also contemplates competent management by a miller who thoroughly understood such machinery and was able to manipulate and handle it so as to secure the best results of which it was capable [and who was fully disposed to give it a fair trial—in other words, by one in sympathy with the system].

Which the court embodied in the charge, except the concluding part enclosed in brackets, which it refused to give; to which ruling and refusal the plaintiff duly excepted.

The plaintiff also excepted to so much and such parts of the charge as is hereinafter set forth, on the ground and for the reason that, as the plaintiff claims, the same authorizes the jury to allow the
45 defendant and to deduct from the claim of the plaintiff as a part of the expense of changing the mill over so as to make it conform to the contract, the cost of the new machinery put into the mill, pursuant to Hick's programme, amounting to $1,100.

The portion of the charge referred to is the following:

Fourth. Further and finally, gentlemen, if the plaintiff broke this contract by failing to furnish the defendant such a mill as it was bound to furnish, then, as I have before stated, the defendant had the right to give the plaintiff notice that it was required to remedy the defects, and on its failure to do so the defendant could then proceed and correct the defects himself, so that the mill should be such as he was entitled to have under the contract, and charge the reasonable and necessary expenses of the work to the plaintiff. The limit to which the defendant could go in that direction is this: He would have the right to make the mill completely answer the demands of the contract and nothing more—that is, a first-class complete roller mill of the designated capacity, capable of doing as good work as other first-class roller mills of similar grade & capacity would do on the same kind of stock. He would only have the right to incur and make the plaintiff chargeable with such ex-
46 penses as were reasonable and necessary to put the mill in that condition.

The testimony on the part of the defendant tends to show that he paid out twenty-seven hundred and thirty-seven dollars & thirty-one cents for work on the mill after April 1st and for additional milling machinery. I understand this includes what was paid Mr. Montague for services. This amount, it is claimed by the defendant, *it* was necessary with economical management to expend in putting the mill in the required working condition. This is disputed by the plaintiff, and it is for you to say what is the fact, if you reach this question in the case.

As I have stated, the plaintiff can only be charged with what was actually necessary to make the mill conform to the contract, if it did not originally do so.

If the system put into defendant's mill could have been perfected by alterations in matters of detail so as to make it first class, complete, capable of doing the work contemplated by the contract, then the additional work on the mill should have been limited to such alterations; but if it could not be thus perfected without more radical changes and additions, then the defendant had the right to

proceed so far as actual necessity required, making the ex-
47 pense of the work as moderate and reasonable as the circumstances permitted.

I do not understand that any of the machinery which the plaintiff put in the mill was taken out, but changes and additions were made.

Mr. Montague testifies that the following entirely new articles of machinery were put in, the cost of each being also stated:

| | |
|---|---|
| One single set of smooth rolls, 9 x 18 inches | $308 63 |
| One small aspirator, of Gray's patent | 30 00 |
| 2 of Prince's dust-collectors | 300 00 |
| 1 bran-duster, of August Heine's patent, used for dusting tailings from centrifugal reel, also taking the place of a bolt | 125 00 |
| 1 of Morse elevator bolts | 337 50 |
| This makes a total of | $1,100 56 |

For new machinery, and this I understand to be a part of the $2,737.31.

Now, it is an important question for you to determine whether this new machinery was absolutely essential to complete the mill if it was defective and to make it such a mill as the contract required the plaintiff to furnish.

It is claimed by the plaintiff that to remedy the alleged defect in certain purifiers and dust-collectors, one or more, it was only necessary to increase the revolutions of a certain fan or certain fans, and that additional dust-collectors were unnecessary. This is denied by the defendant, who claims that, as the machinery was
48 constructed, this alleged defect could not be thus remedied.

So far as bolting-chests were concerned, the contract, as you remember, provided that the plaintiff should furnish one bolting-chest of certain dimensions or all bolting-chests that should be necessary for a complete job. Without enlarging upon this branch of the case, the court must leave it for you to ascertain and say whether the expenditure made by the defendant was reasonable and necessary for the completion of mill if it was incomplete or defective. If it was, then it should be allowed as a counter-claim against the plaintiff. If it was not, then what sum, if any, was it necessary or reasonable to so expend, and what, if anything, should be allowed to the defendant on account of this work and machinery, either or both, which he thus added to this mill.

And because the above matters do not appear of record herein this bill of exceptions is prepared and submitted in order that the matters and things therein contained may become and be made a part of the record herein.

Dated July 11, 1885.

CHARLES E. DYER, *Judge.* [SEAL.]

49 November 13, 1885.—This day came the plaintiff, by its attorney, and filed the bond of C. S. Birge in the sum of five

hundred dollars, conditioned that said plaintiff shall prosecute a writ of error to effect and answer all damages and costs if it fails to make its plea good; which bond is approved by the district judge and is as follows:

*Bond for Costs on Writ of Error.*

"Know all men by these presents that we, Birge & Smith and C. S. Birge, of the city of Milwaukee, in the State of Wisconsin, are held and firmly bound unto Amos Phelps, of Delevan, Wisconsin, in the full and just sum of five hundred dollars, to be paid to the said Amos Phelps, his certain attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind our ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

Sealed with our seals and dated this eleventh day of November, in the year of our Lord one thousand eight hundred and eighty-five.

Whereas lately, at a term of the circuit court of the United States for the eastern district of Wisconsin, in a suit depending in said court between Stilwell & Bierce Manufacturing Company, plaintiff, and Amos Phelps, defendant, judgment was rendered against the said plaintiff, Stilwell & Bierce Manufacturing Company, and the said Stilwell & Bierce Manufacturing Company having ob-
50 tained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation, directed to the said Amos Phelps, citing and admonishing him to be and appear at a Supreme Court of the United States to be holden at Washington the second Monday of October next:

Now, the condition of the above obligation is such that if the said Stilwell & Bierce Manufacturing Company shall prosecute its writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

BIRGE & SMITH. [SEAL.]
C. S. BIRGE. [SEAL.]

Sealed and delivered in presence of—
G. W. HAZELTON.

Bond approved.
Nov. 13, '85.
CHAS. E. DYER, *Judge.*"

Whereupon a writ of error and citation issued, and a copy of said writ of error lodged for the defendant in error.

51 UNITED STATES OF AMERICA, } ss:
*Eastern District of Wisconsin,* }

I, Edward Kurtz, clerk of the circuit court of the United States of America for the eastern district of Wisconsin, do hereby certify that I have compared the writings annexed to this certificate with their

originals now on file and remaining of record in my office, and that they are true copies of such originals and correct transcripts therefrom, being a full and complete transcript of the record in the case — The Stilwell & Bierce Manufacturing Co. *vs.* Amos Phelps.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Milwaukee, in said district, this 27th day of November, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the 110th.

[Seal U. S. Circuit Court, Eastern District Wisconsin.]

EDWARD KURTZ, *Clerk.*

52 UNITED STATES OF AMERICA, *ss:*

[Seal U. S. Circuit Court, Eastern District Wisconsin.]

The President of the United States of America to the judges of the circuit court of the United States of America for the eastern district of Wisconsin, Greeting:

Because in the record and proceedings, as also in the rendition of a judgment in a plea which is in the said circuit court of the United States of America for the eastern district of Wisconsin, before you, between the Stilwell & Bierce Manufacturing Company, plaintiff, and Amos Phelps, defendant, a manifest error hath happened, to the great damage of the said Stilwell & Bierce Manufacturing Company, as by the complaint appears, and it being fit that the error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in the Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error that of right and according to law and custom of the United States should be done.

Witness the Honorable Morrison R. Waite, Chief Justice of the said Supreme Court of the United States, this thirteenth day of November, in the year of our Lord one thousand eight hundred and eighty-five, and of the Independence of the United States the 110th.

EDWARD KURTZ,
*Clerk U. S. Circuit Court for the Eastern Dist. of Wisconsin.*

[Endorsed:] Filed November 13, 1885. Edw. Kurtz, clerk.

53 UNITED STATES OF AMERICA, *ss:*

To Amos Phelps, Greeting:

[SEAL.] You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October next, pursuant to a

writ of error filed in the clerk's office of the circuit court of the United States for the eastern district of Wisconsin, wherein the Stilwell and Bierce Manufacturing Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice done to the parties in that behalf.

Witness the Honorable Charles E. Dyer, district judge of the United States for the eastern district of Wisconsin, at the city of Milwaukee, in the said district, this 13th day of November, A. D. 1885, and of the Independence of the United States the 110th.

CHAS. E. DYER, *Judge.*

Service of this citation is accepted this 16th day of November, A. D. 1885.

FISH & DODGE,
*Att'ys for Def't.*

Endorsed on cover: E. Wisconsin C. C. U. S. No. 209. The Stilwell & Bierce Manufacturing Company, plaintiff in error, *vs.* Amos Phelps. Filed December 3, 1885.

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THE STILLWELL AND BIERCE [redacted]
COMPANY.

[redacted]

vs.

ASHER PHELPS.

[redacted]

[redacted]

[redacted]

# Supreme Court of the United States.

THE STILLWELL AND BIERCE MANUFACTURING COMPANY,

*Plaintiff in Error,*

vs.

AMOS PHELPS,

*Defendant in Error.*

## Brief on behalf of Plaintiff in Error.

### STATEMENT.

The plaintiff in error is a corporation organized under the laws of Ohio, extensively engaged in manufacturing and putting in roller-mill machinery for producing so called patent flour.

On the 30th day of May, 1883, the said plaintiff in error entered into a written contract with the defendant (Ex. A, p. 7), whereby it agreed to furnish and put into his flouring mill at Delavan, Wisconsin, the machinery and appliances for a first class roller mill of seventy-five barrel capacity for the sum and price of $9000—$3000 to be paid when the machinery arrived at Delavan; $4000 when the mill should be completed and in running order *to the satisfaction of the defendant*, and the balance $2000 within ninety days after the completion of the said mill *as aforesaid*.

The mill was to be completed and put in complete running order within ninety days, but was not in fact completed till some time after the date named.

The action was brought April 22d, 1884, to recover the balance due for the machinery, stated in the complaint at $5,727.53.

The case shows that after the work was completed and tested by plaintiff in error and claimed to be in compliance with the contract, the defendant was dissatisfied with the job and employed a miller named Levi Hicks to look it over and try it and see if it could be made to operate satisfactorily, and if not, to report what was needed.

Mr. Hicks, whose experience in such matters was very limited (fol. 36), reported that in order to make it a first-class mill it would require a "general overhauling" (p. 17.) He subsequently prepared a diagram of his own for reconstructing the mill.

After notice to the plaintiff in error (p. 18), to put the mill in order, the defendant employed a millwright to reconstruct the mill upon the diagram or plan furnished by Mr. Hicks at an expense of $2,737.31, one thousand one hundred dollars and fifty-six cents thereof being for *new machinery* introduced into the mill as auxiliary to that furnished by plaintiff under the contract.

The above sum the defendant claimed to recoup in the action, and at the same time alleged and claimed damages for breach of contract, delay, etc., (see answer, p. 6.)

## ASSIGNMENT OF ERRORS.

1. The court erred in the construction given to the contract introduced in evidence.

2. The court erred in holding and charging the jury that in this class of cases and under this form of contract defendant might retain and appropriate the machinery and at the same time contest his liability to pay the contract price therefor.

3. The court erred in holding and charging the jury that under this form of contract the defendant was at liberty to keep the machinery and use it in reconstructing the mill on a new diagram which involved the expenditure of eleven hundred dollars for new machinery and recoup such expenditure in this action for the contract price of the property.

4. The court erred in holding and charging the jury that under the action in this case the defendant was entitled to claim $1100, expended for new and additional machinery procured and used in overhauling and reconstructing the mill.

5. The court erred in holding and charging that the contract in this case should be construed and understood precisely as if the agreement had been to supply and set up machinery which should do good work.

6. The court erred in excluding the testimony of Charles Guissner, a witness called by plaintiff in error to the question of the rental value of the mill property on the ground that he had not seen it, it being shown that he owned and operated a similar mill in the adjoining county.

7. The court erred in its application of the law touching the measure of damages in this class of cases.

The portion of the charge excepted to is the following:

Fourth. Further and finally, gentlemen, if the plaintiff broke this contract by failing to furnish the defendant such a mill as it was bound to furnish, then, as I have before stated, the defendant had the right to give the plaintiff notice that it was required to

remedy the defects, and on its failure to do so the defendant could then proceed and correct the defects himself, so that the mill should be such as he was entitled to have under the contract, and charge the reasonable and necessary expenses of the work to the plaintiff. The limit to which the defendant could go in that direction is this: He would have the right to make the mill completely answer the demands of the contract and nothing more—that is, a first-class complete roller mill of the designated capacity, capable of doing as good work as other first-class roller mills of similar grade and capacity would do on the same kind of stock. He would only have the right to incur and make the plaintiff chargeable with such expenses as were reasonable and necessary to put the mill in that condition.

The testimony on the part of the defendant tends to show that he paid out twenty-seven hundred and thirty-seven dollars and thirty-one cents for work on the mill after April 1st and for additional milling machinery. I understand this includes what was paid Mr. Montague for services. This amount, it is claimed by the defendant, *it* was necessary with economical management to expend in putting the mill in the required working condition. This is disputed by the plaintiff, and it is for you to say what is the fact, if you reach this question in the case.

As I have stated, the plaintiff can only be charged with what was actually necessary to make the mill conform to the contract, if it did not originally do so.

If the system put into defendant's mill could have been perfected by alterations in matters of detail so as to make it first-class, complete, capable of doing the work contemplated by the contract, then the additional work on the mill should have been limited to such alterations; but if it could not be thus perfected without more radical changes and additions, then the defendant had the right to proceed so far as actual necessity required, making the expense of the work as moderate and reasonable as the circumstances permitted.

I do not understand that any of the machinery which the plaintiff put in the mill was taken out, but changes and additions were made.

Mr. Montague testifies that the following entirely new articles of machinery were put in, the cost of each being also stated:

| | |
|---|---|
| One single set of smooth rolls, 9x18 inches, | $308.06 |
| One small aspirator, of Gray's patent, | 30.00 |
| Two of Prince's dust collectors, | 300.00 |
| One bran duster, of August Heine's patent, used for dusting tailings from centrifugal reel, also taking the place of a bolt, | 125.00 |
| One of Morse elevator bolts, | 337.50 |
| This makes a total of | $1,100.56 |

for new machinery, and this I understand to be a part of the $2,737.31.

Now, it is an important question for you to determine whether this new machinery was absolutely essential to complete the mill if it was defective, and to make it such a mill as the contract required the plaintiff to furnish.

It is claimed by the plaintiff that to remedy the alleged defect in certain purifiers and dust collectors, one or more, it was only necessary to increase the revolutions of a certain fan or certain fans, and that additional dust collectors were unnecessary. This is denied by the defendant, who claims that as the machinery was constructed this alleged defect could not be thus remedied.

So far as bolting chests were concerned the contract, as you remember, provided that the plaintiff should furnish one bolting chest of certain dimensions or all bolting chests that should be necessary for a complete job. Without enlarging upon this branch of the case, the court must leave it for you to ascertain and say whether the expenditure made by the defendant was reasonable and necessary for the completion of mill if it was incomplete or defective. If it was, then it should be allowed as a counter-claim against the plaintiff. If it was not, then what sum, if any, was it necessary or reasonable to so expend, and what, if anything, should be allowed to the defendant on account of this work and machinery, either or both, which he thus added to this mill.

## ARGUMENT.

The contract in the case going upon the basis that the machinery when set up should operate to the *satisfaction of the defendant*, the latter was required to refuse its acceptance and demand its removal, or to retain it and pay for it. He did neither the one or the other.

The machinery was put in during the summer and fall of 1884. A second trial of the mill, as constructed under the contract, was made the first week in February, 1885, in the presence of several experienced millers, and at this time the plaintiff claimed that the machinery was in good condition and did good work, and that the defendant ought to be satisfied with it, but in fact he was not.

On the 3d day of March, 1885, the defendant employed one Levi Hicks, a practical Miller (fol. 33), to examine the mill, and ascertain what it needed, and Hicks reported, after looking it over and trying to run it, that it required a "general overhauling" (fol. 35).

The defendant on the first of April following, served on the plaintiff's attorney this notice: "If your clients do not within ten days proceed to put the mill in *repair* so that it will do good

work, Mr. Phelps will employ the best millwrights he can obtain and put the mill *in order* and charge the expense to your clients," and at the expiration of the ten days employed a millwright and proceeded to build the mill over upon a totally new diagram furnished by Hicks (fol. 35), introducing $1100.00 worth of new machinery and incurring an expense of $2,737.31.

The plaintiff in error contends that under contracts of this description, where the thing furnished is to be satisfactory to the purchasing party and he neglects to return or to offer to return it, but takes it into possession and uses it either in the shape in which it is, or for the purpose of making it over into something different, he thereby obligates himself to pay for it at the contract price, and is not at liberty to recoup the cost of such reconstruction in an action for the price.

Campbell Co. vs. Thorpe, 36 Fed. Rep. 414.
McCarren vs. McNutty, 7 Gray 139.
Brown vs. Foster, 113 Mass. 136.
Wood Machine Co. vs. Smith, 50 Mich. 570.
Hallidie vs. Ry. Co., 63 Cal. 575.
Hoffman vs. Gallagher, 6 Daly 42.
Singerly vs. Thayer, 108 Penn. St. 295.
Manuf. Co. vs. Chico, 24 Fed. Rep. 893.
Seeley vs. Wells, Atlantic R. Vol. 13, 736.
McClure vs. Briggs, 58 Vt. 82.
Railroad Co. vs. Bryden, 65 Md 198.
Manufacturing Co. vs. Ellis, 38 N. W. R. 906.
Platt vs. Broderick, 38 N. W. R. 579.
Machine Co. vs. Chesherown, 33 Minn. 32.
Gray vs. R'd Co., 11 Hun. 70.

The doctrine of the above cases and of others which might be cited, is that under a contract to manufacture or furnish an article which shall satisfy the purchasing party, no action can be maintained for the contract price until such party has expressly or impliedly accepted the article, and that he may accept or reject without being obliged to give a reason for his determination.

The doctrine of these cases is that such a contract stands on a different footing from a contract to furnish a machine which shall do good work, or as good work as other machines of the same character and class, and a different rule governs the right of the respective parties.

In the latter case the plaintiff may bring his action as soon as he has furnished an article which *ought* to be satisfactory; in the former case not until the purchasing party has given notice of acceptance, or done some act which amounts to an acceptance.

Such a contract may operate unjustly to the party who has undertaken to supply an article on such a condition, but as it is

the contract of the parties the courts can only enforce it, as the parties have made it, except that when it appears that the defendants dissatisfaction is feigned and fraudulent, he will be required to pay for the property.

It necessarily follows from this doctrine that a party who exacts such a contract must stand upon it himself. He cannot require a party to provide him with an article which shall satisfy him, and then claim for himself the advantages which belong to the other class of contracts. This would be to appropriate both the sword and the shield and to disarm his adversary. In other words, he cannot exact such a contract and claim the peculiar advantage which it gives him without accepting corresponding obligations.

Because he *may* accept or reject, the law says he *ought* to accept or reject. Hence, in some of the cases cited, the failure of the purchasing party to return, or to offer to return, or to demand the removal within reasonable time has been construed into acceptance.

As the other party is substantially at his mercy and cannot maintain his action until something is done or sanctioned which amounts to acceptance, he ought in justice to accept, or require the article to be removed, within reasonable time, and cannot avail himself of the rights in regard to keeping the article and perfecting it, which arise under a different contract.

Any other construction must operate unequally, and afford an advantage which may be employed as it was in this case to accomplish gross injustice to the other party to the contract.

The recent case of the *Campbell Printing Press Co. vs. Thorpe*, 36 Fed. Rep., is in point.

The plaintiff agreed to sell the defendant certain printing presses, etc., and guaranteed that the presses "should be free from defective material or workmanship, and should do their work satisfactorily." The referee to whom the case was referred found that neither of the presses was satisfactory to the defendant, nor did they do their work reasonably well; yet he found as a conclusion of law that the plaintiff was entitled to recover the whole agreed price, upon the theory that it was the duty of the defendant to reject the presses if not satisfied with them, and that, having kept them, there was no method of estimating the loss sustained by reason of their dissatisfaction; in other words, the value of a press which should work to defendant's satisfaction was not capable of pecuniary estimation."

On exceptions to the referee's report, the case came before Circuit Judge Jackson and District Judge Brown, of the Eastern District of Michigan, for review. The opinion by the District Judge affirms that there is no doubt of the general proposition that where one party agrees to do a piece of work to the satisfaction of another, such, for instance, as a portrait, a photograph, or bust, a suit of clothes, a musical instrument, or a piece of furniture, the buyer may reject it without assigning any reason for his dissatisfaction.

In such case, the law cannot relieve against the folly of the vendor by inquiring whether the dissatisfaction of the vendee was based on reasonable grounds or not. It is even doubtful whether he can inquire into the good faith of the vendee's decision. After citing the authorities, the following is quoted from the opinion in *McCarren vs. McNulty*, 7 Gray, 139:

"It may be that the plaintiff was injudicious or indiscreet in undertaking to labor and furnish materials for a compensation made dependent upon a contingency so hazardous or doubtful as the approval of a party particularly in interest. But of that he was the sole judge. Having voluntarily assumed the obligation and risk of the contract, his legal rights are to be ascertained and determined solely according to its provisions."

The article to be furnished here was a book-case, which was to satisfy the president of the Young Men's Society of St. Peter's Church.

"Whether these words"—quoting further from the opinion in the printing press case—"should receive the same construction when the suitableness of the article involves no question of taste or personal feeling, but simply of mechanical fitness to do a certain work or accomplish a certain purpose, admits of some doubt. The authorities are not entirely harmonious, but the decided weight of authority is in favor of the construction given to it by the referee. * * * The New York cases seem, at first blush, to lay down a different rule; but, when carefully examined, the difference is more apparent than real. * * *

Notwithstanding the cases in New York, and admitting all that is claimed for them, the weight of authority as well as of reason inclines us to the opinion that the parties must stand to their contract as they have made it. * * *

In *Manufacturing Co. vs. Chico, 24 Fed. Rep. 893*, it was held that where under a contract a fire engine was to be made and delivered which should be satisfactory to the purchaser, it must in fact be satisfactory to him or he is not bound to take it; but that when the purchaser was in fact satisfied but fraudulently and in bad faith declared that he was not satisfied, the contract had been fully performed by the vendor and the purchaser was bound to accept the article. This I regard as an accurate summary of the whole law on the subject. * * Had the covenant been that the presses should work well we should have no doubt that the defendants might have recouped such damages, and the referer would have found them capable of estimation. These damages would have been the difference in value between presses which would work reasonably well and those which were actually furnished. But in attempting to apply the same rule in the present case we encounter a formidable difficulty from the impossibility of fixing the value of machines which shall work to the satisfaction of the defendants. It will not do to say that such value shall be guaged by that of a

machine which will work reasonably well, because such a press might not have been satisfactory to the vendee, or he might have been content with one which would not have worked to the satisfaction of experts in the business. We think that having elected to retain the presses they are bound to pay the full price for them. The exceptions to the referee's report will therefore be overruled and judgment entered upon his finding."

The other cases cited above are mostly cases touching mechanical appliances, and while they do not discuss so fully the legal consequences of such a contract they all emphasize the doctrine that as the parties have made the contract they must be held to its terms. They furthermore hold directly or inferentially that until the party of the second part does something which amounts to evidence of acceptance no action can be maintained against him.

Now, inasmuch as acceptance in some form is necessary to the right of action, it follows that whatever acts amount in law to an acceptance must be binding upon both parties alike and must necessarily repel and defeat the claim of defendant that he could accept without obligation to pay the contract price.

This case is much stronger than the Printing Press case, because here the defendant actually takes possession of the property by an affirmative act and uses it as auxiliary to the reconstruction on Hicks' diagram; and it is also stronger in the fact that here the flour produced by this machinery was of so good a quality that when it was being tested in comparison with that produced by Hicks in the presence of the jury the latter falsely asserted and claimed that the flour produced by plaintiff had been fraudulently changed (fols. 43 and 23½).

Again the defendant being under no legal duty to accept the machinery, which could be enforced, in other words having the power to accept or reject, the case stands as if the plaintiff in error had left with the defendant an article—say a carriage, a piano, a reaper or a printing press—at a given price to examine and test subject to approval.

In *Witherbee vs. Sleeper*, 101 Mass. 138, a machine was sold on trial and the buyer used it neither accepting nor rejecting it. The seller replevied on the ground of non-payment, but it was held that the title was in the assignee of the buyer, who had become insolvent.

In *Fairfield vs. Manufacturing Co.*, 38 Wisconsin 346, a machine was left with the defendant under an express agreement that if it failed to work it should be laid aside, but if used more than two days the machine should be considered as fulfilling the warranty. The court held that if defendant used the machine more than two days he would be deemed as accepting it and would not be heard thereafter to allege that it did not work well.

In *Dewey vs. Erie Borough*, 14 Penn. 211, a note was given for the price of a town clock, payable in one year, conditioned that

the clock performs to the satisfaction of the town council. In a suit on the note it was proven that the clock was not satisfactory, but the suit was sustained because the council did not offer to return it or give notice of dissatisfaction. This case was approved in *Speckler vs. Marsh*, 36 Md. 222.

In *The Prairie Farmer Co. vs. Taylor*, 69 Ill. 440, the action was for a press delivered under an agreement that the buyer should have thirty days to determine whether to keep the press or not. The court said on failure of appellant within thirty days to elect whether it would keep the press or not the right vested at once to recover the contract price.

These cases, it is respectfully submitted, are in complete harmony with the views expressed in the case of *Campbell Co. vs. Thorpe* and lend support to the law as there laid down.

2. But if it be held that the contract in this case is subject to a different rule from that laid down in the cases already cited, in other words that these cases do not state the law, then we claim that the doctrine invoked by the defendant ought not to be applied to this case.

1st. Because the notice served does not convey any intimation of such expenditures as were charged.

The notice is, unless your clients "proceed within ten days to put the mill *in repair* so that it will do good work, Mr. Phelps will employ the best millwrights he can obtain and *put the mill in order*, and charge the expense to your clients" (fol. 37).

No one could infer from this notice that the defendant was intending to "generally overhaul" the mill and reconstruct it on a totally different diagram, adding a large amount of new machinery. —Had the defendant frankly informed us that he had been advised that the machinery would all have to be overhauled and the mill reconstructed on a different diagram and new machinery introduced, he would at least have been entitled to credit for giving us notice of what was actually contemplated, but when he speaks simply of *repairing* and *putting in order*, we have no reason to infer that he means to build the mill over, on a new plan.

Such a notice is necessarily misleading and calculated to work injustice.

The expert evidence on the part of the plaintiff in error shows (fol. 41) that even if the mill had the defects specified by defendant's witnesses that such defects related simply to matters of detail

that could be easily remedied at slight expense and did not call for or justify a general overhauling or reconstruction of the mill.

Had the plaintiff been duly appraised of what was actually intended it is reasonable to suppose that some plan would have been proposed for a further test of the machinery, or for some disposition of the controversy which would have been mutual satisfactory and the cost of reconstruction on a plan furnished by a party of such limited experience (fol. 36) avoided.

2d. Because such alleged damages were manifestly not within the contemplation of the parties. The answer (fol. 10) alleges that the plaintiff in error, had for a long time prior to making the contract, been engaged in the business of manufacturing, dealing in, and constructing machinery and apparatus for flouring mills, on what is known as the roller system, etc.

That a company so engaged, should be compelled to employ competent help to furnish the diagrams or plans for setting up its machinery, and insuring success does not need to be affirmed. Without such help it could not prosecute its business. In fact, the engineer who furnished this diagram was the inventor of one of the well known systems for roller mills, who testified that he had furnished more than 500 diagrams upon which mills had been constructed in different parts of the country.

It ought not to be any more doubtful whether such a concern should furnish machinery which would do good work than whether a Morgan Reaper or a Corliss Engine would do good work.

That the system agreed to be furnished and set up was likely to require overhauling on a plan provided by a party who had previously furnished two diagrams, and one of these only partial, could not have been anticipated as among the possibilities. The contract itself is conclusive proof that the plaintiff in error had the most undoubted confidence in its ability to do what it undertook to do.

Under the rule which limits damages to such "consequences as may be reasonably supposed to have been in contemplation of both parties at the time of making the contract," can it be said that the damages allowed the defendant in this case were just? *Mayne on Damages*, p. 10, 2d edition, where the rule in *Hadley vs. Baxendal* is given, and the authorities commented upon.

3d. Because the rule invoked by the defendant is not the proper test and measure of damages in such case.

In his work on damages, Vol. 2, p. 482, Sutherland states the rule in these words: The measure of damages for breach of contract for putting up particular work, as for instance, a steam boiler by doing the work unskillfully or with defective material is the difference between its value in its defective condition and what its value would be if completed in compliance with the contract. This latter sum may be more than the contract price or it may be

less, but it is obviously the proper standard by which to measure the damages of the employer, because a boiler so completed is exactly what he is entitled to; the contractor obtains also just what his defective work is worth. This is quoted from the opinion of Cooley, C. J., in *White vs. Brockway*, 40 Mich. 209. To the same effect are:

Merrill vs. Nightengale, 39 Wis. 250.
Boothby vs. Scales, 27 Wis. 626.
Bonnell vs. Jacobs, 36 Wis. 59.

In Wood's Mayne on Damages, sec. 118, the same rule is laid down. "A thing may be very valuable in itself, but if it is to be altered into something different the cost of doing so may absorb its whole price. * * * One important element in the inquiry will be, could the subject matter of the contract be returned or not?"

Here there is no pretense and no evidence that the machinery could not have been returned. It consisted, as the case shows, of machinery manufactured and set up.

"If it could, then as the defendant has kept it of his own free will he ought to pay for it as much as the plaintiff could have sold it for if he had taken it back—that is its real value"—which in the absence of evidence on the question of intrinsic value will be the contract price.

"But there are two cases where he cannot return it. The one is where the sale is of a specific chattel upon which the owner has had an opportunity of exercising his own judgment, and which is bought with a warranty; the other where labor is expended upon the defendant's own property, as, for instance, his materials or his land," citing the case of clothing cut and made from material furnished, and the erection of a coach-house where the party had been directed to make a stable.

"In these cases the cost of altering would be the only fair measure of reduction."

The case shows what is also familiar to every one who has ever investigated the subject, that these roller mills may be constructed on different plans or diagrams. It is not denied that this machinery was manufactured, furnished, and set up pursuant to the contract—that is to say, so as to embrace all the machinery specified in the contract, while the diagram furnished by Hicks for reconstruction involved a totally different system, and the use of a large amount of new machinery. It did not differ in principle from altering an Allis engine into a Corliss, or a "Victory" power press into a Hoe.

If the right claimed here to use this machinery for a new mill obtains, not only does the defendant get a different and more expensive equipment than he bargained for, but the plaintiff in error

is required to pay for it, and to pay for the non-use of the mill during the four or five months occupied in the reconstruction.

As was said on the application for a new trial: "It would certainly have been much better for the plaintiff if the defendant had rejected the machinery *in toto* and permitted us to take and use it in other mills. Almost every piece of it could have been utilized without appreciable loss, and it hardly falls short of gross injustice to allow the defendant to retain it and swamp its value by the scheme adopted."

It is not denied that cases arise where a defendant is authorized to supply defective parts in a machine and recoup the cost, but to contend that under the sanction of this doctrine a machine may be reconstructed into something different, and made auxiliary to a mass of new machinery, at the expense of the plaintiff, seems so at war with principles of justice, that I cannot deem it necessary to pursue further this branch of the argument.

3. It has long been the settled doctrine of the State of Wisconsin that a party may return or offer to return an article which does not comply with the terms of the warranty, and recover back what he has paid.

Wooddle vs. Whitney, 23 Wis. 55.

4. A question is raised as to the admissibility of testimony to show the rental value of such a mill. One Charles Guissner was called as a witness by plaintiff (fol. 29), who testified that he was the owner and manager of a roller mill of about the same capacity near Waukesha village, in Waukesha county, and had owned and operated said mill for several years, and was personally acquainted with the milling business and familiar with roller mills. That Waukesha county adjoins Walworth county in which the defendant's mill was located, but that he had not been in Delavan, and knew nothing from personal observation or knowledge of the extent of the custom work of the mill, its business or product nor of the water power.

He was asked to state the rental value of the mill in question during the period in question.

Objected to because the witness had never seen and had no personal knowledge of the property in question. Objection sustained.

He was then asked to state such rental value upon the supposition that the said mill had a good water power and all the business it could attend to as claimed by defendant, and a capacity of manufacturing seventy-five barrels per day.

The same objection was raised and sustained, the plaintiff excepting.

The plaintiff in error submits that this evidence ought not to have been excluded. It is true the witness had not seen the property, but he owned and operated a similar mill in the adjoining county, and it hardly seems reasonable that his testimony should not have been of some value upon the hypothetical case stated in the question. The rental value of mill property upon the supposition of abundant water power and all the business it could do was manifestly about the same in the one county as the other. Take the case of an opera house, or a hotel or a shipyard, it would seem upon principle that a witness familiar with such property in a neighboring city where the conditions are similar ought to be competent to testify as to rental value.

In *Butler vs. Mehrling*, 15 Ill. 488, the court says; "But in valuing the *use* of property, those acquainted with the kind and use of such property may be allowed to testify as to the value of the use of such property, and such opinions may be weighed together with similar opinions of those who know the property itself. In *Alfonso vs. U. S.*, 2 Story 421, Mr Justice Story allowed Boston Merchants to testify as to the market value of a lot of sugar in Cuba.

In *Sturgis vs. Knapp*, 33 Vt. 531, the question in dispute touched the value of a railroad during the time it was in the hands of a receiver, and the court admitted the opinion of witnesses acquainted with the business of the road and the expense of operating it.

In *Whitbeck vs. Railroad Co.*, 36 Barb 644, where defendant was sued for having destroyed fruit trees by fire from its locomotives. The court says "that it was not necessary that the witness should have seen the trees, having learned from other witnesses the kind of trees they were.

In *Whitney vs. Thatcher*, 117, Mass. 526, in discussing the qualification of a witness to testify to the value of property, this language is used by the court: "It is not necessary in order to qualify one to give an opinion as to value, that his information should be of such a direct character as would make it competent in itself as primary evidence. It is the experience he acquires in

the ordinary conduct of affairs and from means of information such as are usually relied on by men engaged in business for the conduct of that business that qualifies him to testify."

In *Cliquots Champagne case*, 3 Wall 114, this court adopted a rule quite as liberal as the one we are contending for.

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*Attorney for Appellant.*